United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7087

To be argued by
NORMAN SOLOVAY

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,
Plaintiff-Appellee,

—against—

INMOBILIARIA MELIA DE PUERTO RICO, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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Preliminary Statement

Defendant-Appellant appeals from a default judgment entered by the District Court (Motley, *D.J.*) on January 22, 1976 (JA 237)*, which awarded plaintiff the sum of approximately $340,000 (consisting of the $285,000 demanded in the complaint as a brokerage fee, plus interest from November 1, 1972, plus attorneys' fees in the sum of $2,743.50, and other costs) and dismissed defendant's $1,500,000 counter-claim.

Plaintiff had requested this relief in a cross motion, originally returnable June 20, 1975 (herein the "Cross Motion"). The basis for plaintiff's Cross Motion was defen-

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* JA references are to pages of the Joint Appendix; EV references are to pages of the Exhibit Volume.

dant's alleged failure to comply with certain discovery demands. The District Court's initial decision granting plaintiff's Cross Motion was set forth in a brief handwritten Memorandum Opinion (JA 173) dated January 12, 1976. However, during the period of approximately six months that the Cross Motion was *sub judice,* the parties, in proceedings before the Pre-Trial Magistrate supervising discovery, had agreed upon a schedule for the completion of discovery. This schedule was embodied in an order prepared by plaintiff and adopted by the Pre-Trial Magistrate. Defendant, having set in motion all steps necessary to comply with this order, was prevented from complying only by the District Court's rejection of the Pre-Trial Magistrate's order and the entry, without advance warning, of the default judgment.

On January 21, 1976, the District Court entertained oral argument in response to a motion by defendant for reconsideration of the default ruling (JA 193). Although the transcript of that argument suggests the District Court was unaware when it issued the default memorandum opinion on January 12, 1976, that discovery was about to go forward (see JA 213-14), the Court nevertheless thereafter adhered to its original decision.

Issues Presented

Was it error and/or an abuse of discretion for the District Court, because of alleged non-compliance with certain discovery demands, to have directed entry of the default judgment against defendant on January 12, 1976 and to have dismissed defendant's counterclaims pursuant to plaintiff's Cross Motion of June 20, 1975:

1. Where testimony and documents adduced in already extensive pre-trial proceedings suggest both that plaintiff

was not, in fact, the procuring cause of the loan ultimately obtained and could not, therefore, have prevailed on the merits in its claim for a mortgage placement brokerage fee, and that defendant's counterclaims, based upon serious factual misrepresentations by plaintiffs, are valid and substantial;

2. Where a stipulation of the parties referring "all future pre-trial discovery proceedings" to Magistrate Sol Schreiber "for supervision" had enabled plaintiff to press forward with discovery demands which would otherwise have been held in limbo for the period of a year during which the District Court kept *sub judice* a motion by defendant to transfer the action to the District of Puerto Rico;

3. Where the same stipulation which permitted plaintiff to press its discovery demands while defendant's transfer motion was *sub judice,* also mandated a denial or withdrawal of plaintiff's Cross Motion as moot or as having been waived, since further proceedings were had pursuant to such stipulation and a discovery schedule established thereunder by Magistrate Schreiber;

4. Where the aforesaid discovery schedule had been incorporated into an order agreed to and prepared by plaintiff and adopted, with minor revision, by Magistrate Schreiber, and defendant was in process of complying therewith, the remaining deposition witness, Pedro Fullana, having flown to New York City from Puerto Rico, in order to do so;

5. Where defendant's then attorney, had proferred, and but for the timing of the default decision, would have provided an affidavit stating that none of the remaining documents sought by plaintiff existed or could be located, so

that the proposed production of Pedro Fullana for a deposition in New York would have represented full compliance with the final discovery schedule agreed upon by the parties and embodied in the order of Magistrate Schreiber;

6. Where the District Court's order rejecting Magistrate Schreiber's discovery order and schedule and granting plaintiff's six months old Cross Motion was issued without prior notice or warning to defendant and ignored the waiver and abandonment of such Cross Motion implicit in plaintiff's subsequent agreement before Magistrate Schreiber to a discovery schedule;

7. Where plaintiff's discovery was already extensive and complete enough to suggest that the deposition of Pedro Fullana, for lack of which the default issued, was not essential to the prosecution of plaintiff's case; and

8. Where defendant had moved to have the final deposition conducted in Puerto Rico, where Mr. Fullana resided, and such motion should properly have been granted under the circumstances.

Statement of the Case

The Action's Factual Background

Plaintiff's claim for a brokerage fee relates to the placement of a combined construction and mortgage loan for a proposed 627-unit condominium hotel ("Apartotel") in Puerto Rico. However, it is clear that plaintiff was not, in fact, the procuring cause of the loan that defendant finally obtained.

The parties' initial discussions took place early in 1972. On March 13, 1972, plaintiff's officer in charge, Leonard

Wilkes ("Wilkes"), forwarded a proposed brokerage agreement designating plaintiff as defendant's "sole and exclusive agent" to make application for a loan or loans in connection with "defendant's proposed Apartotel" (EV 302 and 304). Although this was similar to the agreement sued on by plaintiff in this action, in this first version of its proposed broker's agreement plaintiff had demanded a 45-day brokerage exclusive. Defendant rejected this 45-day exclusive as too long and plaintiff thereupon agreed to a 30-day period (JA 8).

As part of its inducement for this exclusive, plaintiff represented to defendant that it had a close, "well-entrenched" relationship with First Mortgage Investors Trust ("FMI"), a large real estate trust. Jack Berger ("Berger"), defendant's chief financial adviser, describing the conversation in his pre-trial deposition, said (EV 233-34):

> ". . . [A]t some point [Wilkes] indicated that Paine, Webber had even taken FMI public or acted as their investment bankers, so there was a very close relationship there. He went a long ways in certainly assuring me that the deal would be done with FMI."

Thereafter, in and prior to June, 1972, plaintiff continually represented to defendant that it had obtained from FMI a firm and definite commitment to make the loan.* In this context, plaintiff requested a $50,000 good faith

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* See, for example, the handwritten notes from Wilkes to defendant's president (EV 512) stating:

"Everything is go re Melia San Juan.

"Please rush the following to me:

(a) the signed FMI application

(b) the $50,000 refundable deposit to . . . FMI

(c) My letter of 6/26 . . . updating our authorization.

Good luck to us all!!"

deposit and extensions of its brokerage exclusive "for the time required to process [the loan] formally through the FMI Trustee Committee approval. . . ." However, after "repeated assurances [from plaintiff to defendant] that [the loan] was at the last stage of the finalization" and that FMI's Trustees' approval was merely a formality (EV 280 and 234), plaintiff and defendant learned that FMI was not going to make the loan after all.

Berger's description of his conversation with Wilkes when this became known was as follows (EV 285-86):

> ". . . well, first of all obviously he was as pained, I guess, as we were and as surprised as we were and said that he had been given assurances that the deal was concluded and was terribly sorry that this thing had fallen apart."

This testimony by Berger is entirely consistent with an October 3, 1972 internal memorandum from Wilkes to his superior. There, in describing the FMI turndown from plaintiff's point of view, Wilkes says: "We were kicked in the head!!" (EV 528).

Apparently still reeling from its "kick in the head," plaintiff thereafter apologetically faded from the scene. As Berger testified, defendant, having become "increasingly disillusioned," held no subsequent discussions with Wilkes regarding financing and they had both politely parted, at the end, with the vaguely expressed hope that "we could find some other community of interest in the future and that was the way it was left." Understandably, Wilkes made no further efforts, thereafter, to communicate about other financing for the Apartotel. (EV 286-87).

Defendant, having lost some seven months, ultimately obtained its loan from the Housing Investment Corpora-

tion ("HIC"), using a Puerto Rican broker, unrelated to plaintiff, to whom it paid a commission (see EV 93-97, 162-69). The sharp increase in construction and interest costs during this period form the primary basis of defendant's counterclaims (EV 78 and 287).

Plaintiff's failure to perform in accordance with its promises apparently did not diminish its desire to collect its commission. Near the outset of the arrangements between plaintiff and defendant, and before placing all his eggs in the FMI basket, Wilkes had allegedly sent out a number of brochures describing the proposed loan to various other lenders. Upon learning of the HIC loan, Wilkes claimed that HIC had been one of the recipients of such a mailing and that, as a result, plaintiff was entitled to its full brokerage commission on the loan.

This claim was advanced by plaintiff despite Wilke's admission that he had received no response from HIC after the mailing and that he had refrained from any further follow-up because "We were so far along with FMI . . . that we didn't pursue it." (EV 420-22).

Furthermore, prior to the entry of the default judgment, defendant had made the following submission by way of affidavit in an earlier motion (JA 48, 51):

> ". . . the president of HIC, one John D. Yates, is prepared to testify that he is aware of no approach by plaintiff to HIC in the spring of 1972 or at any other time. While there is always the possibility that some contact was made between Plaintiff and HIC of which Mr. Yates is unaware, . . . Mr. Yates will testify that any such possible contact had no bearing on the decision by HIC to make the loan to the defendant."

In view of the foregoing, plaintiff's claim to be a procuring cause of the HIC loan seems virtually frivolous.

The Action's Procedural Background

The summons and complaint were served on June 4, 1973 and defendant, represented by its then attorneys, Weiss, Rosenthal, Heller & Schwartzman (the "Weiss Firm"), served its original answer (JA 15) on July 30, 1973.

At some point in the proceedings difficulties developed between the foreign based defendant and its New York lawyers which, on June 3, 1975, caused the Weiss Firm to move for leave to withdraw as counsel (JA 137). Plaintiff has made much of these difficulties between defendant and the Weiss Firm, implying that they were created by defendant for purposes of delay and are indicative that defendant's defenses and counterclaims are without merit. However, the record affords no basis for plaintiff's insinuations. The rather unusual procedural history of the case provides a more plausible and reasonable explanation for these difficulties.

Plaintiff made the first of various complaints about defendant's alleged failure to proceed with discovery by way of a motion to dismiss or for imposition of sanctions, returnable December 26, 1973 (JA 28). Mr. Rosenthal of the Weiss Firm, responded (JA 41):

> "Apparently, this motion was precipitated by a telephone conversation that I had with counsel for plaintiff in which I advised him that, due to the press of other business, neither Mr. Cohen nor Mr. Berger would be available for depositions during the month of December. I also told counsel that I would be away during most of the month of January. Specifically, I will be taking depositions in Los Angeles on January 8 through January 11 and in San Francisco on January 22 and January 23. From January 12 through January 21, my family and I will be spending a much-

needed vacation on the West Coast. I will be returning to my office on Friday, January 25. For these reasons, I advised counsel that I could not reschedule the depositions for any dates prior to the end of January.

Defendant has no objection to the Court fixing dates for the depositions of its officers, directors and/or managing agents at the very end of January or at any time thereafter. We will also produce the remainder of the documents requested by plaintiff in late January or early February.

It is unfortunate that the Court had to be troubled with this scheduling problem. We certainly have not caused any substantial delay in the progress of this matter. The depositions in question can probably be completed in two days, if indeed they take that long."

By memorandum endorsement (JA 43), Judge Motley referred the motion "to Magistrate Jacobs for assignment to a Magistrate for hearing and report on whether the Court should impose sanctions and/or compel discovery in accordance with plaintiff's application."

The case was then assigned to Magistrate Sol Schreiber. The parties voluntarily extended the scope of this referral by a stipulation (hereinafter the "Discovery Supervision Stipulation") (JA 44), signed by both sets of attorneys, which not only set forth a specific discovery schedule,* but also stated:

"All future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision."

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* The depositions of Martin L. Cohen ("Cohen"), defendant's president, and Jack H. Berger ("Berger"), its Chief Financial Adviser, were scheduled for February 28 and March 5, 1974, respectively; the deposition of another officer, residing in Puerto Rico, Pedro Fullana ("Fullana"), was "deferred *sine die*."

Thereafter, the depositions of Cohen and Berger (EV 1 and 202) went forward in accordance with the schedule set forth in the Discovery Supervision Stipulation. Both depositions were, to all intents and purposes, concluded in a day, each (see EV 113 and 299), as the Weiss Firm had originally suggested would be the case. They exhaustively covered all areas of inquiry pertinent to plaintiff's claim, as well as a number that arguably went beyond reasonable theories of relevance. Although the Weiss Firm apparently conceded plaintiff's right to further discovery, it appears from a reading of the deposition transcripts, that any such additional discovery would be repetitious, burdensome and unnecessary and that even the two depositions taken were, to a large extent, duplicative of each other.

In affidavits submitted by its attorneys, plaintiff described negotiations that had taken place and in which the Weiss Firm had participated, pursuant to which the action had come close to being settled (see JA 66). Ultimately, however, the proposed settlement was rejected by defendant's principals. Thereafter, apparently for the first time, and only as part of its preparation for pre-trial depositions, the Weiss Firm explored the facts in sufficient detail to ascertain that its client had valid counterclaims (JA 54; EV 58-59). Leave of Court was thereafter obtained (JA 130) to assert such counterclaims in an amended answer (JA 132).

The delay by the Weiss Firm in exploring the counterclaims and its focus, instead, on a settlement which its client opposed suggests one explanation of the friction that developed. In addition, further misunderstanding between the Weiss Firm and its client may well have arisen because of the District Court's congested calendar. When the depositions of Cohen and Berger were concluded and plaintiff

persisted in additional onerous discovery demands, including seeking the deposition, in New York, of Pedro Fullana, a Puerto Rican resident, defendant, by motion returnable April 22, 1974 (JA 46), requested, *inter alia,* that the action be transferred to the District Court of Puerto Rico or, alternatively, that Fullana's deposition be held in Puerto Rico. Calendar congestion was evidently such that Judge Motley was prevented from deciding defendant's motion for almost a full year (JA 127). In the meantime, and while defendants were hoping that the case would be transferred, plaintiff was enabled by the Discovery Supervision Stipulation to continue to press various of its discovery demands (see JA 125). One may readily surmise that a foreign based defendant would be confused by the seemingly inconsistent, multiple tracks on which the litigation was progressing at this point and become suspicious of its counsel as a result.*

Nor was there, in fact, any substantial, non-compliance with plaintiff's document production requests. The deposition of defendant's president, Martin L. Cohen ("Cohen") was taken on February 28, 1974. Right at its outset, Cohen had stated (EV 7-8 and 13) that there was little in the way of correspondence because "we did practically everything

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* The Weiss Firm declined specific comment on the nature of the difficulties that had arisen between it and its client. Significantly, however, in the final oral argument before Judge Motley, defendant's then lawyer, as part of his discussion of such difficulties, did comment (JA 229):

> "Your Honor, I think there is one other factor we have to throw in that hopper to make it complete. In 1974 I made a motion, early in '74, March or April, for the following relief: to transfer this case to the district court in Puerto Rico, for permission to amend the answer and interpose a counterclaim, and for the Court to direct that Mr. Fullana's deposition be taken in Puerto Rico.
>
> One year later, approximately, this Court decided that motion, denied the application to transfer it to Puerto Rico—"

in person"; and in connection with a request that there be a further search for additional documents, he commented "I don't know if there is anything different that you are going to receive. I just mailed you whatever they had."

Plaintiff's attorneys attempted thereafter to impose their own, Americanized view of proper record keeping on defendant. Thus, they kept insisting, via various applications, that there ought to be more documents (see, *e.g.*, JA 149). It ultimately turned out that this was just not so and that virtually all defendant's pertinent documents had, in fact, been produced as part of its initial production, just as Cohen had stated. The sudden and unexpected grant of a default judgment by Judge Motley on January 12, 1976, had the effect of preventing the Weiss Firm from presenting affidavits which would have so indicated. But such affidavits were expressly proffered to the Court (and rejected) in the final oral argument on rehearing before Judge Motley (JA 222-24).*

Thus, it now appears that the default judgment rested entirely on defendant's failure to produce non-existent documents and on its prior failure to produce, for deposition, Pedro Fullana, even though Mr. Fullana had flown from Puerto Rico to New York in order to be deposed (see JA 223, 199). This would seem unfair, under any circumstances. It seems particularly inappropriate in view of the further proceedings that had been held before Magistrate Schreiber, including a hearing on December 1, 1975 (JA

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* The Weiss Firm, at such hearing, stated, in response to the Court's question as to whether all records requested by plaintiff had now been produced (JA 222):

> "As far as I know, Your Honor . . . they have been produced and my clients are prepared to give affidavits to that effect."

Earlier, moreover, the Weiss Firm, by letter, had confirmed "that we have no further documents to produce." (JA 170).

197), that came about as a result of the following sequence of events:

The Weiss Firm had moved for leave to withdraw as counsel by motion dated June 3, 1975 and returnable June 13, 1975 (JA 137). In response, plaintiff had made its Cross Motion (JA 142), pursuant to which the default judgment was ultimately entered. Both the motion and Cross Motion were then referred to Magistrate Schreiber (JA 197), who scheduled the December 1, 1975 conference.

Following the conference on December 1, 1975, Magistrate Schreiber recommended that the motions be disposed of on the following terms and conditions (JA 197-98, 216-17, 220-23):

> (1) Pedro Fullana was to be deposed in New York on a mutually selected date in January, 1976;
>
> (2) Defendant, by a specified date in January, would either produce additional documents sought by plaintiff or affidavits indicating that the requests had been fully complied with; and
>
> (3) The Weiss Firm would be permitted to withdraw only if substitution of new counsel were effected in such manner as not to occasion further delay.

These recommendations of Magistrate Schreiber were agreed to by both sides and an order for the Magistrate's signature (JA 191) was prepared by plaintiff's lawyer (JA 220). This order, with certain handwritten changes inserted by Magistrate Schreiber, was signed by him and forwarded to Judge Motley to be "So Ordered." It called for the production of documents, or, alternatively, defendant's affidavits indicating compliance, by January 15, 1976 and for the deposition of Pedro Fullana on January 22, 1976 (JA 191). Magistrate Schreiber's transmittal letter to Judge Motley (JA 190) noted that:

> "A copy of this recommended order has been sent to respective counsel and they have been advised that if they wish to file any opposition to my order, they should do so by filing papers with Your Honor not later than December 20, 1975."

No opposition to the order was thereafter filed by either side (JA 216; see also JA 198).

Pursuant to the Magistrate's proposed order, defendant made arrangements for the deposition of Pedro Fullana, moving it forward in time, however, with plaintiff's consent, to January 14, 1976 from the January 22, 1976 date originally appearing in the order (JA 199). Pursuant to such arrangements, Mr. Fullana arrived from Puerto Rico at the offices of the Weiss Firm on January 13, 1976, to prepare for the deposition which he thought was scheduled to take place the next day (JA 199). However, between the time Mr. Fullana set out from Puerto Rico and his arrival in New York, Judge Motley, by the January 12, 1976 memorandum endorsement (JA 173), had rejected Magistrate Schreiber's proposed order and directed entry of a default.

Plaintiff's attorneys, after learning of Judge Motley's decision, declined to proceed with the deposition of Mr. Fullana (JA 215). In addition, defendant's attorney was deflected from producing the affidavits of full compliance with document production, which, as he noted, he was otherwise prepared to file immediately (JA 223-24). Defendant's attorney attempted, informally, by a telephone call to Judge Motley's Chambers, to obtain reconsideration of the default ruling while Mr. Fullana was still present and available for a deposition. Judge Motley, however, directed that any such questions be raised by way of formal motion papers (JA 226). Defendant there-

after filed its motion for reconsideration of the ruling (JA 194), which led to a hearing on January 21, 1976.

At the outset of the January 21, 1976 reargument hearing, the Court was unclear as to the sequence of events. At first, Judge Motley appeared to be of the view that defendant improperly failed to appear for a deposition scheduled on January 12, 1976 and "that after the parties were notified of the Court's January 12th order, the defendant decided to appear the next day, the 13th or the 14th, for the taking of the deposition . . ." (JA 213-14). In actuality, the date originally scheduled for defendant's deposition in Magistrate Schreiber's order was January 22nd (JA 214), and this was moved to January 14, 1976 at defendant's suggestion.

In addition, the Court apparently was under the impression that affidavits from defendant indicating compliance with document discovery demands were overdue as of the time the default was entered (see JA 223). In fact, however, these affidavits were not due until January 15th under Magistrate Schreiber's proposed order (JA 223-24), and, as noted, they would have been supplied by this date but for the default ruling on January 12th.

Although these facts were clarified at the January 21, 1976 hearing, the District Court denied defendant's motion for reconsideration and adhered to its original ruling. In so doing, it gave two different reasons for its decision. Near the outset of the hearing, the Court stated that "the reason for [rejecting the Magistrate's report] is that this case is on the trial calendar. . . ." (JA 217). Later, in the course of the hearing, the Court stated (JA 231):

> "the record is clear that your client wilfully failed to appear for his deposition, and that is why a default judgment is going to be entered against him, notwithstanding the recommendations of the Magistrate, be-

cause I disagree with it, that he is entitled to a second chance." *

It is respectfully submitted that, the facts and circumstances of this case are not such as to warrant the drastic penalty imposed by the District Court.

ARGUMENT

POINT I

The Drastic Penalty of a Default Judgment Was Unwarranted on the Facts of the Instant Case.

The "totality of circumstances" ** present in the instant case militate strongly against the drastic penalty imposed by the District Court. Among these circumstances is the dubious merit of plaintiff's claim,*** taken in conjunction with defendant's presumptively valid counterclaims. In addition, "the more complete showing . . . on the late and somewhat prejudicial occasion of an application for a

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* At the conclusion of the hearing, the Court once again similarly commented (JA 235):

"As I told you, it is my ruling that I am not bound by the Magistrate's reports in these matters. The Magistrate is not a district judge. And I have gone over this, and the record is extensive and clear that your client wilfully disobeyed the orders of the Court.

So you can go to the Court of Appeals and we will find out whether your client can wilfully disobey a court order."

** *Trans World Airlines, Inc.* v. *Hughes*, 449 F. 2d 51, 57 (2d Cir. 1971).

*** Plaintiff had earlier taken the position that it is entitled to its commission under its contract even if it were not the procuring cause of the loan. However, the law seems otherwise. See, *e.g.*, *Character and Extent of Right of Broker Who Has Exclusive Contract, Where Sale is Effected Without His Agency*, 64 A.L.R. 295 (*passim*, and see, especially, pp. 403, 415).

reargument," * has now made it apparent that most of the alleged delays in discovery were more imagined than real. Plaintiff's most serious complaints related to defendant's failure to produce documents which ultimately proved to be non-existent—as defendant had, right from the outset, indicated was probably the case. Furthermore, the issues involved in the case are relatively narrow and simple and they were thoroughly explored in the two, reasonably extensive, depositions plaintiff conducted of defendant. Thus, it does not appear that the allegedly uncompleted discovery was essential to plaintiff's prosecution of the case. Nor can defendant's delay be said to have been wilful. To the contrary, at the time the default order issued, defendant was in process of complying with a Pre-Trial Magistrate's order which, by express agreement of the parties, would have concluded defendant's outstanding discovery obligations. Additionally, assuming the District Court's overruling of the Pre-Trial Magistrate's discovery order would normally be within its discretion, in this instance it pressed the parties into a breach of their prior express, voluntary stipulation to refer *all* discovery questions to the Pre-Trial Magistrate. Moreover, the procedure followed by the District Court in its unexpected rejection of the Magistrate's order, left defendant with no adequate warning of, nor opportunity to correct, the alleged default. And this lack of warning was particularly harmful to a defendant whose counsel, many months before, had moved for leave to withdraw from the case.

Decisions granting default judgments under Rule 37 of the Federal Rules of Civil Procedure have regularly evoked particularly close appellate scrutiny. For example, in *Syracuse Broadcasting Corporation* v. *Newhouse*, 271 F.2d 910, 914 (2d Cir. 1959), this Court, held that "Dismissal

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* *Gill* v. *Stolow*, 240 F.2d 669 (2d Cir. 1957).

with prejudice is a sanction to be applied only in extreme situations . . .," and went on to state:

> ". . . [W]hen we are convinced that the court below has exceeded a proper discretion in that the order imposed was too strict or was unnecessary under the circumstances, we would be remiss in our duties if we did not set that order aside."

In the case of *Gill* v. *Stolow, supra,* this Court, in reversing a default judgment, gave particular weight to information adduced at a hearing on reargument, saying (240 F. 2d at p. 670):

> ". . . viewed with the hindsight afforded us by a study of the entire record, the penalty assessed is too drastic and the case must be returned to accord defendants a trial of the seriously contested issues of fact.
>
> * * * * *
>
> The problem of a witness coming from Munich to New York City at his own expense . . . can be serious. . . ."

The same can be said of the present case. Moreover, other parallels between the instant case and *Gill* v. *Stolow* can be drawn. There the party appeared for deposition, coming from abroad, after entry of a default order. This Court gave considerable weight to this trip, characterizing it (at p. 672) as "a real attempt to comply with the court's order thereafter—circumstances which demonstrated that Harry's default, whatever its extent, was not properly to be characterized as willful." This Court also held it appropriate to "view events against the background of Harry's distance from the jurisdiction" and to take into account, in mitigation of the default, "some failure of communication between Harry in Germany and

defendant's counsel here, so that his situation had not been thoroughly presented to the court . . . [until] the late and somewhat prejudicial occasion of an application for reargument." (240 F. 2d at pp. 671-72).

The parallels with the instant case are striking. Here, too, there were difficulties in communication between New York counsel and a foreign witness, and, finally, a good faith effort to comply which vitiates any claim of wilfulness.

The discussions regarding dismissals under Rule 37 in the various *Hughes* decisions* are also apropos.

In the first of these decisions in this Court, it was stated by way of preface (332 F. 2d at p. 614):

> "The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited."

This Court then went on to justify its affirmance of the default judgment against Hughes by, *inter alia,* the fact that "Hughes' deposition was absolutely essential to the proper conduct of the litigation." (332 F. 2d at p. 615).

Here, the sought for deposition of Pedro Fullana is at best marginally useful; indeed, in all probability, it would be almost totally repetitious of the prior two depositions of defendant. No showing can realistically be made that it was "essential" to this litigation.

Similarly, this Court, in the *Hughes* case, carefully tracked a series of complex facts which made it absolutely

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* *Trans World Airlines, Inc.* v. *Hughes,* 32 F.R.D. 604 (SDNY 1963), aff'd 332 F. 2d 602 (2d Cir. 1964) and 449 F. 2d 41 (2d Cir. 1971), rev'd 409 U.S. 363 (1973).

clear that Hughes' nonappearance was "a wilful and deliberate failure to proceed with the scheduled discovery proceedings" (332 F. 2d at p. 613).

No such facts are present here and, to the contrary, defendant's last witness, Mr. Fullana, made a trip from Puerto Rico to New York in order to be deposed.

The lower court's opinion in the *Hughes* case, moreover, indicates that particular pains were taken to permit Hughes to change his mind and to appear for a deposition before entry of a default. For example, a pre-trial hearing was held at which Hughes' counsel was required to state expressly "that he had advised his client of the sanctions available to TWA . . ." The lower court expressly found, after such a hearing, "that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful. . . ." (32 F.R.D. 604, 607).

No comparable wilful or deliberate conduct is present in the instant case Moreover, if the present record were not sufficient, as it stands, to negate wilfulness and to require reversal, then the unexplained difficulties between defendant and its then attorneys would, in all events, have mandated an evidentiary hearing, just as it did in *Flaks* v. *Koegel,* 504 F. 2d. 702 (2d Cir. 1974). There, in remanding for such a hearing where a default had been entered despite difficulties caused by the withdrawal of counsel, this Court commented (at pp. 708, 712):

> "There is no question but that dismissal of a pleading is the most drastic sanction provided by the Rule. Judge Sterry Waterman has commented:

> If the cause has not gone to trial and it is before a Court of Appeals following an order of dismissal, or a contempt conviction, the reviewing court, before affirming the use of these drastic sanctions permissible under Rule 37, will scrutinize the situation out of which the sanction order arose. The contempt sanction, though wicked-sounding, is not nearly as drastic a sanction as dismissal. It only leads to a fine or a possible jail sentence—its use does not result in the termination of a litigant's cause of action."
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> * * * * *
>
> "If counsel rather than the client were at fault and if serious efforts to obtain new counsel had been made under the handicaps described, then the order entering the default judgment was an abuse of discretion. [Citing cases.]"

Moreover, great weight was evidently given by this Court (at p. 712) to the fact that a showing had been made "that there are meritorious defenses to the action." Such a showing can clearly be made here, too.

POINT II

The District Court Should Have Granted Defendant's Earlier Motion for a Protective Order Requiring That Pedro Fullana Be Deposed in Puerto Rico.

The deposition of defendant's representative Pedro Fullana was noticed for New York City. Mr. Fullana resides and works in Puerto Rico, where defendant's principal place of business is located. It is settled that the depositions of officers and other executives of a corporate defendant should be held at the principal place of business of the defendant. *Twardzik* v. *Sepauley*, 286 F. Supp. 346

(E.D. Pa. 1968); *Fischer & Porter Co.* v. *Sheffield Corp.*, 31 F.R.D. 534 (D. Del. 1962); *Krauss* v. *Erie Railroad Co.*, 16 F.R.D. 126 (S.D.N.Y. 1954). See also cases cited in footnote 1 of 4 Moore's Federal Practice ¶26.70[1.-3].

In *Hyam* v. *American Export Lines, Inc.*, 213 F. 2d 221 (2d Cir. 1954), this Court stated as follows (at pp. 222-3):

> ". . . not in every case is a party seeking pre-trial discovery entitled as of right to a deposition on oral examination at the situs of the forum. His preference therefor, if opposed under Rule 30(b), must be weighed both against his actual, as distinguished from his supposed, need for oral examination at the forum and against the resulting burden to his opponent. Where these considerations are in serious conflict, the judge after weighing the impact of his ruling on the parties may order the deposition to be taken, if not at the forum, at an appropriate distant place under terms whereby the reasonable expense thereof may ultimately be reflected in the taxable costs, or may order that the depositions be taken, at least in the first instance, only on written interrogatories."

Judge Motley's weighing of plaintiff's need for conducting the deposition in New York against the burden to defendant (and Fullana) of so doing, was limited to the following:

> "There is no allegation that Fullana's absence from work will result in harm to defendant's business. *Tomingas* v. *Douglas Aircraft Co.*, 45 F.R.D. 94 (S.D.N.Y. 1968). On the other hand, it would seem more economical that the one witness rather than the two lawyers incur travel expenses." (JA 131)

In *Tomingas* v. *Douglas Aircraft Co.*, 45 F.R.D. 94 (S.D. N.Y. 1968), the Court required defendant to produce two

employees for deposition in New York notwithstanding that defendant's principal place of business was in California. However, that was an action arising out of an airplane crash. The two employees sought to be deposed possessed unique information and the Court determined that defendant, a large corporation, was the party most able to bear the cost of travel and to obtain least expensive transportation rates. Moreover, the depositions were to be scheduled in the manner "most convenient" to deponents. None of these circumstances are present in the instant case.

Although the place at which depositions are to be held is within the discretion of the court, there do not appear to have been any circumstances which warranted the District Court to depart from the usual rule and to require that Fullana travel to New York for the deposition.

CONCLUSION

The default judgment should be vacated and the case remanded and reassigned for trial before a new judge.

Respectfully submitted,

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